

REMARKS

Reconsideration and allowance of the subject application in view of the following remarks is respectfully requested.

Claims 22-27 and 29-41 are pending in the application. The claims remain unchanged notwithstanding the *35 U.S.C. 103(a)* rejections relying on *JP 3059475* and *Suchan* (WO2004/041107).

A. Applicants respectfully traverse all rejections, because *Suchan* is not prior art to the present invention.

In particular, *Suchan* does not have a *102(e)* date because it was published not in English as clearly shown in at least page 2 of the attached *Exhibit A*. See also attached *Exhibit B* which is an excerpt of *MPEP*, section 706.02(f)(1), Example 5.

The earliest reference date of *Suchan* is its international publication date (May 21, 2004) which postdates the claimed priority date (March 11, 2004) of the instant application.

A certified copy of the priority document No. AU2004901278 has been submitted and receipt-acknowledged by the USPTO in the January 16, 2009 Office Action. Since the priority document No. AU2004901278 is in English, no translation is needed, and the priority claim has already been perfected.

MPEP, section 201.15 states

If the priority papers are already in the file when the examiner finds a reference with the intervening effective date, the examiner will study the papers, if they are in the English language, to determine if the applicant is entitled to their date. If the applicant is found to be entitled to the date, the reference is simply not used but may be cited to applicant on form PTO-892. If the applicant is found not entitled to the date, the unpatentable claims are rejected on the reference with an explanation.

Since the priority papers have been already in the file, at least as of the date of the January 16, 2009 Office Action, Applicants believe that a determination whether Applicants are entitled to the claimed priority date is part of the Examiner's examining work. Nevertheless, Applicants have independently conducted a review of the file and respectfully submit that the claimed invention is entitled to the AU priority date as exemplarily shown herein below for independent claim 22 (page/paragraph/drawing numbers given are of the priority document No. AU2004901278)

22. A one-use dispensing device for separately storing, dispensing, and applying proportional amounts of two substances, comprising: (*Fig. 1*)
a respective flexible receptacle for each substance; and (*4, 4' in Fig. 1, page 6, 3rd paragraph*)
a line of fold extending over the device between the receptacles; (*3 in Fig. 1, page 5, 2nd paragraph*)
wherein each of the receptacles has a circular base and a flat circular upper surface, wherein a diameter of the upper surface is smaller than a diameter at the base; (*Fig. 1, page 5, 1st paragraph*)
wherein said device being foldable about said line of fold so that the receptacles are superimposed; (*Fig. 1*)
wherein a rupturable outlet is defined for each receptacle, each rupturable outlet having a flat edge for assisting in mixing of the two substances; (*8 in Fig. 1, page 7, 3rd paragraph*)
wherein said outlets converge towards the line of fold; and (*Fig. 1*)
wherein said receptacles include indicia indicating where a thumb and forefinger of a user should be positioned to allow for substantially complete evacuation of the receptacle through the outlet; (*6 in Fig. 1, page 6, 1st paragraph*)
whereby when the device is folded about said line of fold, said outlets are superposed for dispensing and mixing the substances when the receptacles are squeezed; and (*Fig. 1*)
whereby the device is configured to be manipulated by a user in a one-handed operation to dispense the two substances. (*page 7, 3rd paragraph*)

It should be now clear that

- The priority claim in the instant application has been long perfected;
- The claimed subject matter is entitled to the AU priority date of March 11, 2004;
- The earliest reference date of *Suchan* is May 21, 2004, i.e., after the claimed and perfected AU priority date of March 11, 2004.

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Thus, *Suchan* is not prior art to the claimed invention.

Withdrawal of all rejections is now believed appropriate and therefore respectfully requested.

B. Applicants further respectfully request that the Examiner provide a full translation of the *JP 3059475* reference if it is to be further relied upon as support for a rejection of the instant claims.

A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984) cited in *MPEP*, section 2141.02.VI (emphasis added).

The Office has apparently relied only on the drawings of *JP 3059475* which do not reflect all teachings of the reference. The *JP 3059475* reference must be considered as a whole if continued to be relied upon to reject the claims. Such consideration is not possible absent a complete and accurate translation.

Along this vein, the *MPEP*, section 706.02 mandates that “a translation must be obtained so that the record is clear as to the precise facts the examiner is relying upon in support of the rejection” (emphasis added). Moreover, the Board of Patent Appeals and Interferences has stated that “[i]f a translation is not provided by the examiner, the applicant may wish to consider seeking supervisory relief by way of a petition (37 C.F.R. § 1.181) to have the examiner directed to obtain and supply a translation.”¹

Accordingly, Applicants respectfully submit that the drawings alone of the *JP 3059475* reference cannot be relied upon for a rejection of the instant claims, and respectfully request that a human-made, accurate and complete translation of the *Matsumoto* reference be provided should the Office continues to rely on *JP 3059475* in subsequent actions.

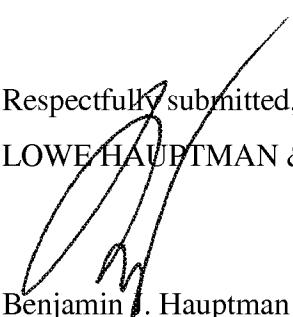
In the absence of other relevant art, all claims in the present application are now believed in condition for allowance and early indication of same is courteously solicited.

¹ See *Ex parte Jones*, 62 U.S.P.Q.2d 1206 at 1208 (PTO Bd. App. 2001) (unpublished).

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The Examiner is invited to telephone the undersigned, Applicant's attorney of record, to facilitate advancement of the present application.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 07-1337 and please credit any excess fees to such deposit account.

Respectfully submitted,
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